In the Supreme Court
of the
United States

October Term, 1975

No. 75-309

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No.

FRANK N. ALIOTO, et al.,
Petitioners,

vs.

WESTERN ADDITION COMMUNITY ORGANIZATION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

The petitioners, Frank N. Alioto, Morris Bernstein and Rudy Tham, as members of the Fire Commission of the City and County of San Francisco; and William Kirkpatrick, John Molinari and Yori Wada, as members of the Civil Service Commission of the City and County of San Francisco, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 27, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, not yet reported, is reproduced in Appendix A to this petition.

The order of the Court of Appeals denying petitioners' petition for rehearing en banc is unreported and is reproduced in Appendix B to this petition.

The opinion of the District Court entered on November 19, 1973, which was appealed to the Ninth Circuit Court of Appeals, is reported at 369 F.Supp. 77 (1973). It is reproduced in Appendix C to this petition.

The supplemental order of the District Court entered on September 23, 1974, is unreported. It is reproduced in Appendix D to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 27, 1975. A timely petition for rehearing en banc was denied on May 30, 1975, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether 10 minority eligibles on the civil service list for H2 Fireman who have temporarily waived appointment but who may withdraw their waiver at any time and request appointment pursuant to the

District Court's racial quota order of November 19, 1973, presents a continuing controversy on the constitutionality of that order.

2. Whether the District Court's continuing jurisdiction to order further racial quotas makes the issues presented by the appeal "capable of repetition, yet evading review."

3. Whether the decision below is in direct conflict with previous decisions of this Court on mootness.

CONSTITUTIONAL PROVISION INVOLVED

1. Constitution of the United States, Article III:

"Section 2. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, . . ."

STATEMENT OF THE CASE

The respondents and plaintiffs below, representing certain minority groups, brought a class action in the District Court against petitioners and defendants below under Title 42 U.S.C. §§ 1981 and 1983. Respondents claimed that the written examination for selection of entry level firemen (Class H2 Fireman) for the San Francisco Fire Department was discriminatory against minority candidates; and that said examination violated their rights to due process and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States.

The District Court entered several orders during various stages of the case. (See reported cases at 330 F.Supp. 536; 340 F.Supp. 1351; 360 F.Supp. 733; 369 F.Supp. 77.) In May 1973, the Court held that the petitioners failed to show that the written test was job-related under the validation requirements of the Guidelines issued by the Equal Employment Opportunity Commission (29 C.F.R. § 1607 et seq.; see opinion reported 360 F.Supp. 733). The Court then ordered the petitioners to empirically validate the written test. The District Court further prohibited use of the written test to disqualify any candidate; and ordered that an eligible list be established on the basis of an oral and athletic test. On November 19, 1973, the court further ordered that the 118 minorities on the eligible list be appointed to vacancies on the ratio of one qualified minority for each qualified nonminority until the minority list was exhausted. (See 369 F.Supp. 77; Appendix C.) The court reserved jurisdiction to determine whether the racial quota should be continued and to grant further affirmative relief as may be necessary.

Petitioners appealed the District Court's racial quota order to the Court of Appeals for the Ninth Circuit claiming that it was violative of the U.S. Constitution and the Civil Rights Act of 1964, as amended. The respondents filed a cross-appeal. Two intervenors, Firefighters Union, Local 798 and an individual nonminority candidate on the eligible list also filed cross-appeals. Petitioners' request for a stay in the District Court was denied. No stay was requested in the Circuit Court but the appeal was expedited for hearing at the request of all parties to the appeal.

While the appeal was pending, the respondents moved the District Court for an order imposing another racial quota to the effect that 60% of all future appointments must be minorities until 40% of the Fire Department personnel were minorities. On September 23, 1974, the court issued a supplemental order to the order which is subject of the appeal. (See Appendix D.) The court held that respondents' motion was premature but ordered petitioners to validate the same written test which the Court had earlier held invalid. (See 360 F.Supp. 733.) It further ordered that in the event that it does not or could not validate the written test, then the court would consider granting a further limited racial hiring quota.[1]

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[1] "(1) The Civil Service Commission is ordered to complete on or before January 31, 1975, validation of its written examination —which validation would make any future appointment ratio order unnecessary.

(2) *If, for any reason such validation cannot be or is not completed by that date,* the Civil Service Commission is ordered to by then have completed further tests (including the non-rated written examination of June 9, 1973 or its pattern equivalent—with not more than a 50% score cut-off) for placement of additional applicants (presumably including minorities) on the Fireman H-2 list—in which event, or in the event of the Commission's failure to comply with either of the above, *the Court, under its previous reservation of power, will consider,* according to the then existing circumstances, (including among other things the number of non-minorities (whites)) appointed meanwhile to the Department under Paragraph 3 (infra) *whether, and if so, to what extent, a further limited quota requirement should be imposed as a condition to appointment of further H-2 Firemen in order to afford relief to any identifiable minority group then on the list.*" (Emphasis added.)

(Appendix D.)

In accordance with the court's supplemental order, the defendants conducted an empirical validation of the written examination and has submitted that study to the Court. Discovery on the empirical validation issue has been completed and the matter is awaiting hearing by the Court. If petitioners fail to prove that the written test is empirically valid under the Guidelines issued by the Equal Employment Opportunity Commission, then the Court will most likely impose further racial quotas on newly established eligible lists.

In the interim period, while the case has been on appeal, the petitioners complied with the challenged order by appointing eligibles from the list in accordance with the hiring quota. During the litigation, which was initiated in 1970, no appointments were made to the entry level fireman rank and, as a result, there had accumulated over 200 vacancies in that position. The petitioners made appointments under the quota order, rather than seek further stay orders because it was necessary to fill the vacancies and provide essential firefighting services. At the same time, petitioners desired to perfect their appeal of the racial quota so that this important constitutional question could be resolved as it relates to the present and continuing controversy between the parties.

While the appeal was pending all but 10 of the minority eligibles on the list were appointed. Those 10 waived the right to appointment but can, at any time, "lift" their waiver and be appointed to an existing vacancy by virtue of the District Court's racial quota order.

The question of mootness was first raised by the Court of Appeals at oral argument on January 16, 1975. The Court of Appeals rendered its opinion on March 27, 1975, dismissing the appeal as being moot without considering the merits of the appeal. (Appendix A.) Petitioners' request for a rehearing en banc was denied without opinion on May 30, 1975. (Appendix B.)

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS ON MOOTNESS

The District Court order of November 19, 1973, expressly reserved jurisdiction to determine whether there should be further racial quotas and to order other affirmative relief.[2] Pursuant to that reserved jurisdiction, the trial court entertained a motion by respondents to impose a further racial quota on any other eligible list established by petitioners. On September 23, 1974, the District Court ordered that:

> "If, for any reason such validation cannot be or is not completed by that date, . . . or in the

[2] "(2) Any excess of qualified non-minority applicants remaining at that point on the Civil Service list shall retain their places thereon and on any future Fireman H-2 Civil Service list constituted as hereinafter *provided, subject only to the court's determination concerning whether the alternating method of appointing qualified eligibles from any future H-2 list should be terminated or continued.*

. . .

"The court, however, reserves power to make such further orders *as may be found necessary to fashion further affirmative relief* compatible with the facts as above found or as they may be hereinafter found." (Emphasis added.)
(Appendix C.)

> event of the Commission's failure to comply with either of the above, the Court . . . *will consider . . . whether, and if so, to what extent, a further limited quota requirement should be imposed* as a condition to appointment of *further H-2 Firemen in order to afford relief to any identifiable minority group then on the list.*" (Emphasis added.)
>
> (Appendix D.)

The reserved jurisdiction by the District Court in its orders of November 19, 1973 and September 23, 1974 clearly demonstrate that there is a reasonable expectation that the trial court will afford further racial quota affirmative relief. If petitioners fail to validate their written test under the Guidelines promulgated by the Equal Employment Opportunity Commission (29 C.F.R. §1607 et seq.), it is almost a certainty that the court will grant further quota relief on the next fireman eligible list. This high probability of another racial quota makes the constitutional issues presented on appeal "capable of repetition, yet evading review." (*Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498 (1911).)

This Court has retained jurisdiction of numerous cases in which the conduct challenged by court action has terminated but where the issues have continuing effects on the rights and duties of the parties or the class they represent. Thus, this Court has held that the termination of a strike does not moot a case where the underlying labor dispute remains unresolved (*Motor Coach Employees v. Missouri,* 374 U.S. 74 (1963)); where a strike has terminated but the challenged governmental action has not ceased (*Super Tire Enginering Co. v. McCorkle,* 416 U.S. 115 (1974)); where pregnancy is terminated before a court determination on anti-abortion laws (*Roe v. Wade,* 410 U.S. 113 (1973); *Doe v. Bolton,* 410 U.S. 179 (1973)); where durational residency laws are challenged and during the pendency of litigation the party satisfies residence requirements (*Sosna v. Iowa,* ..... U.S. .....; 95 S.Ct. 553 (1975); *Dunn v. Blumstein,* 405 U.S. 330 (1972)); where a prohibited exercise of a constitutional right will likely occur again (*Steffel v. Thompson,* 415 U.S. 452 (1974); *Carroll v. Commissioners of Princess Anne,* 393 U.S. 175 (1968)); and where an election has been completed before the issues surrounding that election can be decided by the court (*Moore v. Ogilvie,* 394 U.S. 814 (1969); *Storer v. Brown,* 415 U.S. 724 (1974); *Rosario v. Rockefeller,* 410 U.S. 752 (1973)).

The decision below fails to apply these decisions to the continuing controversy which is clearly evident in this case. The Court of Appeals decision is thus totally inconsistent with this Court's interpretation of what constitutes a case or controversy under Article III of the U.S. Constitution.

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2. THE EXISTENCE OF 10 MINORITY ELIGIBLES UNDER WAIVER PREVENTS MOOTNESS

The majority opinion below concludes that the District Court's order has been "fully effected" inasmuch

as 10 minority candidates under waiver were offered but declined appointment.[3] However, the Circuit Court fails to discuss the right of each minority candidate under waiver to "lift" his waiver and obtain appointment under the District Court's quota order. This right to withdraw a waiver exists for the four year life of the list. There have been, in fact, three minority candidates under waiver who have withdrawn their waiver and who have been appointed ahead of non-minority candidates pursuant to the challenged court order.[4] This clearly demonstrates the continuing nature of the issue on appeal and that the order has not been "fully effected."

It is very probable that other minorities now under waiver on the eligible list will withdraw their waiver and request appointment prior to expiration of the list. In such event, the provisions of the challenged order will be operative to require their appointment on the basis of race. The test for mootness is whether there is a "reasonable expectation that the wrong will be repeated." (*United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953).) It is clear that there is a high probability that (1) the court will grant a further racial quota and (2) that at least one of the 10 minority eligibles under waiver will withdraw that waiver and request appointment under benefit of the

[3]"Since the District Court's Order has been fully effected, however, no decision that we could now render as to the Order's constitutionality could alter the parties' rights and obligations under the Order." (Appendix A.)

[4]William H. Downing, Thomas Villafuarte, Clarence Woods.

racial quota order. Those circumstances demonstrate more than a reasonable expectation that the challenged racial quota will be repeated.

This court's decision in *DeFunis v. Odegaard,* 416 U.S. 312 (1974) is not controlling of the case at bench. The individual plaintiff, Marco DeFunis, was permitted to continue in law school while challenging the school's admission policies. The challenged admission process was not "capable of repetition" for the individual plaintiff since he would be allowed to remain in and graduate from law school regardless of the outcome of his case. Such facts are totally different than the subject case where the trial Court's continuing jurisdiction and likelihood of imposing another racial quota, together with 10 minority eligibles who remain on the list under waiver presents a question which is highly "capable of repetition." Furthermore, the subject case is a class action and the decision of the Court will have a direct effect on both the petitioners and respondents. If only one minority candidate on the civil service eligible list can claim a right under the challenged racial quota, a case or controversy will continue to exist under Article III of the U. S. Constitution.

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3. THERE IS A REASONABLE EXPECTATION THAT THE RACIAL QUOTA WILL BE ORDERED AGAIN

The decision below states that:

"It is purely speculative as to whether the appellees might seek, or the District Court might grant, an order of similar effect in the future."

(Appendix A.)

This conclusion does not comport with the facts. Respondents have moved the court for further quota relief and the court will most likely act favorably on that motion in the event petitioners do not validate the written test in accordance with the Guidelines issued by the Equal Employment Opportunity Commission. (29 C.F.R. §1607 et seq.) Once a party makes out a prima facie case of employment discrimination, the employer has the burden of showing that employment tests have a manifest relationship to the job in question. (*Griggs v. Duke Power Co.,* 401 U.S. 424 (1971).) The burden of proof is a heavy one (*Chance v. Bd. of Examiners,* 458 F.2d 1167 (2nd Cir.) 1972) and in the reported cases most public and private employers have failed to demonstrate that their tests are "job related." (See *Griggs v. Duke Power Co., supra; Albemarble Paper Co. v. Moody,* ..... U.S. .....; Dockets Nos. 74-389 and 74-428, decided June 25, 1975; *Western Addition Community Organization v. Alioto,* 360 F.Supp. 733 (1973); *Officers for Justice v. Civil Service Com. of San Francisco,* 371 F.Supp. 1328 (1973); *Bridgeport Guardians, Inc. v. Bridgeport Civ. Serv. Com.,* 354 F.Supp. 778 (1973); *Castro v. Beecher,* 334 F.Supp. 930 (1971), affd. in relevant part 459 F.2d 724 (1st Cir. 1972); *Chance v. Bd. of Examiners,* 330 F.Supp. 203 (1971), affd. 458 F.2d 1167 (2nd Cir. 1972); *Commonwealth of Pennsylvania v. O'Neill,* 348 F.Supp. 1084 (1972), affd. 473 F.2d 1029 (3rd Cir. 1973); *Harper v. Mayor and City Council of Baltimore,* 359 F.Supp. 1187 (1973); *Commonwealth of Pennsylvania v. Glickman,* 370 F.Supp.

724 (1974); *Smith v. City of East Cleveland,* 363 F.Supp. 1131 (1973).)

It should be noted that petitioners have earlier failed to validate the same written test which the Court has now ordered to be validated again.[5] The Court, in its supplemental order of September 23, 1974, has conditioned the imposition of further racial quotas on the validation of this identical written test. Since petitioners have already failed to meet the burden of proof to demonstrate that the written test was content valid, it is readily apparent that petitioners have an extremely difficult, if not impossible, burden to now demonstrate that the same written test is empirically valid. Facing such a heavy burden of proof, the likelihood that petitioners will show validity of the written examination is remote. Under those facts the Circuit Court erred in concluding that it was likely that petitioners would prove validity of their examination.[6]

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[5]360 F.Supp. 733 at 739:

"Upon consideration of the evidence as a whole, quantitatively and qualitatively, the court finds, after full hearing, that the City's evidence on this issue of 'validation' does not preponderate; at very best, the evidence is no more than evenly balanced and, therefore, the court is bound to resolve the issue against the party having the burden of proof on the issue—in this case the City defendants; further, for reasons hereinabove set forth, the City has failed to make a sufficient prima facie case of validation to justify approval of the proposed written examination on a provisional basis subject to further hearings which would entail long continued litigation and create more uncertainty among applicants for Fireman H-2."

[6]"It is more likely, we think, given the passage of time, that the appellants will have performed an acceptable job-relatedness validation of their already revised written examination for firemen applicants." (Appendix A.)

It must be concluded, that there is more than a *reasonable likelihood* that the trial court's reserved powers of granting further affirmative relief will be invoked. There is, therefore, a controversy which is "capable of repetition, yet evading review." *(Southern Pacific Terminal Co. v. ICC, supra.)*

The concurring opinion below of Justice Barnes expresses "grave doubts" that this action is moot. He recognizes that there is a reasonable expectation that the wrong will be repeated and that it is "capable of repetition, yet evading review." This reluctant concurrence expresses the reasons why the appeal should not be mooted. When there is any doubt as to the mootness of a case, the court ought to retain jurisdiction and adjudicate the existing controversy between the parties.

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4. THIS CASE PRESENTS AN ONGOING CONTROVERSY

This case is still active in the District Court and the parties are subject to the court's continuing jurisdiction. Assuming that one of the minority eligibles withdraws his waiver and requests appointment, the petitioners would be required by the subject court order to appoint that eligible in accordance with the racial quota order. Assuming further that petitioners refused to make such appointment, they would be subject to the contempt powers of the District Court. Under those facts, the Court of Appeals was in error to conclude that the case is moot. It is abundantly clear that the respondents, a class of minority eligibles

on the civil service list, and the petitioners have existing rights and obligations which are subject to the court's jurisdiction. The constitutionality of the racial quota presents a case and controversy as long as there remains one eligible on the list who can claim a right of appointment by virtue of the challenged racial quota. The power of the court over the parties continues undiminished until the last minority eligible is appointed. Then, under its reserved jurisdiction, the court will consider the imposition of further racial quotas in the event petitioners fail to validate their written examination.

The facts establish an extant controversy at all stages of the proceedings; and the Court of Appeals committed error in dismissing the appeal as moot. Not only is the controversy existing at the present time, but due to the reserved jurisdiction of the court to grant further affirmative relief, the racial quota is "capable of repetition, yet evading review." *(Southern Pacific Terminal Co. v. ICC, supra.)*

5. THE ISSUES PRESENTED BY THE APPEAL ARE IMPORTANT

This case, on the merits, presents an issue which is vitally important to the parties involved and to the civil service merit system. The San Francisco Charter requires that all appointments in the public service shall be made solely upon merit and fitness as established by appropriate tests without regard to partisan, political, social or other considerations (§8.310(a)); and that the person standing highest on the list of eligibles shall be certified to a vacant position (§8.329). The racial quota order directly conflicts with these sections of the Charter and with the intent of the civil service merit system. In view of the District Court's probable imposition of further quotas and the existence of minority candidates under waiver who are governed by the court order, it is clear that there is a case or controversy in which it is capable to decide the merits of this important constitutional question. Such decision will not only benefit the parties involved but also the general public. There is no reason to postpone adjudication of such vital constitutional issues presented in the matrix of a continuing case or controversy. Supreme Court Justice Douglas, in his dissenting opinion to the *DeFunis* case urged that the court retain jurisdiction because of the importance of the constitutional question presented by that case. He said at 416 U.S. 312, 350:

> "Because avoidance of repetitious litigation serves the public interest, that inevitability counsels against mootness determinations, as here, not compelled by the record. Cf. United States v W. T. Grant Co., supra, at 632, 97 L Ed 1303; Parker v Ellis, 362 US 574, 594, 4 L Ed 2d 963, 80 S Ct 909 (1960) (dissenting opinion). Although the Court should, of course, avoid unnecessary decisions of constitutional questions, we should not transform principles of avoidance of constitutional decisions into devices for sidestepping resolution of difficult cases. Cf. Cohens v Virginia, 6 Wheat 264, 404-405, 5 L Ed 257 (1821) (Marshall, C. J.).
>
> On what appears in this case, I would find that there is an extant controversy and decide the merits of the very important constitutional questions presented."

The constitutional issues presented by petitioners' appeal are not hypothetical but are real and important to the parties and to the general public. Those constitutional issues should be decided in the context of this adversary proceeding rather than be avoided on an erroneous conclusion that the case is moot.

CONCLUSION

The decision below is clearly in conflict with the decisions of this Court on mootness. The appeal on the merits presents important constitutional issues which are "capable of repetition" and existent in a continuing controversy in the District Court. It appears clear from the facts of this case that the "case or controversy" requirement of the Constitution is satisfied and that the Court of Appeals was in error in dismissing the appeal as moot.

For the foregoing reasons, petitioners respectfully urge this Honorable Court to grant this petition for a writ of certiorari to review the judgment and opinion of the Court of Appeals of the Ninth Circuit.

Dated, San Francisco, California,
August 23, 1975

Respectfully submitted,

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MICHAEL C. KILLELEA,
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(Appendices Follow)

APPENDIX

Appendix A

United States Court of Appeals
for the Ninth Circuit

Western Addition Community Organization, et al., Appellees, vs. Frank N. Alioto, et al., Appellants.	No. 74-1570
Western Addition Community Organization, et al., Cross-Appellants, vs. Frank N. Alioto, et al., Cross-Appellees.	No. 74-1529
Western Addition Community Organization, et al., Appellees, vs. Frank N. Alioto, et al., Intervenor (Firefighters), Appellant.	No. 74-1562
Western Addition Community Organization, et al., Appellees, vs. Frank N. Alioto, et al., Intervenor (Balich), Appellant.	No. 74-1563

OPINION

[March 27, 1975]

Appeal from the United States District Court
for the Northern District of California

Before: BARNES, VAN OOSTERHOUT,* and ELY, Circuit Judges.

PER CURIAM:

The detailed history of the subject controversy, to this time, is carefully set forth in four reported opinions of the District Court. 330 F. Supp. 536 (N.D. Cal. 1971); 340 F. Supp. 1351 (N.D. Cal. 1972); 360 F. Supp. 733 (N.D. Cal. 1973); and 369 F. Supp. 77 (N. D. Cal. 1973).

The suit, a civil rights class action instituted pursuant to 42 U.S.C. § 1981 and 1983, was originally filed in the District Court on June 24, 1970. The appellees sought to remedy a condition that then existed, i.e., that of the 1800 firemen then employed by the San Francisco, California Fire Department, only four were blacks.[1] In its first opinion, 330 F. Supp. 536, the court found that the written examination employed by the Fire Department to select new firemen from job applicants had a discriminatory effect. Concluding, however, that the discriminatory practice was not shown to have been intentional or invidious, the court declined to issue an injunction but reserved the power to make any such additional orders as it might deem necessary in the future. This disposition was apparently induced, in part, because of the ex-

*Honorable Martin D. Van Oosterhout, Senior U.S. Circuit Judge, Eighth Circuit, sitting by designation.

[1]It is recited in one of the District Court's opinions that at the time of the 1970 census, San Francisco's racial composition was 43 percent minority (15 percent black and 28 percent other minority). 369 F.Supp. at 79 n.1.

pressed willingness of the appellants to so modify their previously existing selective process so as to eliminate its discriminatory effects. The principal object was the revision of the appellant's previously existing "Fireman H-2" written examination so as to make them truly job-related. Delay after delay ensued. The court eventually remarked that ". . . the San Francisco Civil Service Commission has three times failed . . . to demonstrate, as required by law, that its challenged Firemen H-2 written examinations have been truly job-related." 369 F. Supp. at 79. The court remarked further:

> "The Commission's dilatoriness in these matters and apparent stubborn insistence upon arguments and alternatives which this court has repeatedly found unacceptable, have created an intolerable situation; the adequacy of Fire Department manpower for the safety of the City is coming into question . . . ."

369 F. Supp. at 80.

In its fourth opinion, from which the above quotations are extracted, the court found that of the then existing 512 qualified applicants for Fireman H-2 positions, 118 were of so-called minority derivation and 394, non-minority. The court thereupon decreed that pending a further Order, the Commission should "forthwith fill existing Fireman H-2 vacancies—one (1) qualified minority applicant and one (1) qualified non-minority applicant alternatively from sublists of qualified minority and non-minority applicants—until the sublist of qualified minority applicants has been exhausted." 369 F. Sup. at 81. It is from this Order that the appellants appeal.

The appellees cross-appeal from the District Court's subsequent refusal to make its temporary one-to-one hiring arrangement permanent.

The appellants did not seek a stay of the District Court's Order pending appeal. Rather, they complied with the Decree's directive. We learned this for the first time during the oral argument of the cause. We suggested from the Bench that the appeal had become moot.[2] The only response of the appellants, as well as of the Intervenor, to our suggestion was that the controversy remained alive, because 10 of the 118 minority applicants had declined offers of Fireman H-2 positions that had been tendered to them by the appellants. This response to the court's suggestion of mootness is not acceptable. The District Court's Order should be fairly interpreted as requiring no more than bona fide offers of employment to the 118 applicants for the vacant Firemen H-2 positions—not the acceptance of the offers by all of the qualified minority applicants. This being our interpretation of the District Court's Order, we conclude that there remains no live and existing controversy in respect to the particular Order from which the appellants appeal.

On this appeal, the appellants assert that the District Court's Order mandates the employment of a racial preference in violation of the equal protection clause of the Fourteenth Amendment to the United

[2]Since a finding of mootness would deprive our court of jurisdiction, there no longer being an actual "case or controversy," U.S. Const. art. III, § 2, we are obligated to consider the question of mootness, even though it was not raised by the parties. *See Sosna v. Iowa*, ... U.S. ....., 43 U.S.L.W. 4125 (U.S., January 14, 1975).

States Constitution. Since the District Court's Order has been fully effected, however, no decision that we could now render as to the Order's constitutionality could alter the parties' rights and obligations under the Order. *See DeFunis v. Odegaard,* 416 U.S. 312 (1974); *North Carolina v. Rice,* 404 U.S. 244 (1971). It is purely speculative as to whether the appellees might seek, or the District Court might grant, an order of similar effect in the future. It is more likely, we think, given the passage of time, that the appellants will have performed an acceptable job-relatedness validation of their already-revised written examination for firemen applicants. Therefore, such extraordinary relief as that contained in the Order here appealed, aimed solely at the dilatory tactics of the appellants and the critical shortage of firemen that existed in 1973, will, in all probability, be unnecessary. *See SEC v. Medical Committee for Human Rights,* 404 U.S. 403 (1972). Accordingly, the principal appeal is dismissed as moot, and we express no opinion as to the constitutional validity of the District Court's Decree.

As to the cross-appeal, a District Court, sitting in equity, is vested with the widest latitude in exercising its discretion in respect to the vacating or modification of an equitable decree. From the record before us we are not persuaded that the court clearly abused its discretion in denying to the cross-appellants, at the time they made their application for permanent relief, the modified decree which they sought. We therefore affirm the Order that the cross-appellants here challenge.

All parties to the appeal and cross-appeal, including the intervening union, shall bear the costs which they, respectively, have incurred in connection with the proceedings in this court.

SO ORDERED.

BARNES, Circuit Judge, concurring:

I have grave doubts that this action (alleged as a class action but apparently not certified as such) is moot. I cannot in good faith say with assurance "that 'there is no reasonable expectation that the wrong will be repeated.'" *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); nor that this case does not involve a short term order "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 515 (1910).

Interpreting the order before us on this appeal as my brothers do,

First: that this appeal is only from paragraph (1) of the order of November 19, 1973:

Second: that because the ten remaining minority applicants have declined offers of employment tendered them "the list of qualified minority applicants has been exhausted";

Third: that the district court may never again act as it heretofore has, to create a "future H-2 list" (even though it asserts it has the future right to do so under paragraph (2) of said order of November 19, 1973); and

finally, recognizing the necessity of husbanding judicial time and effort, *Alton & Southern Railway Company, et al. v. International Association of Machinists and Aerospace Workers*, 463 F.2d 872, 877-82 (D.C. Cir. 1972), i.e., this "rationing [of] scarce judicial resources among competing claimants" (*See:* D. Kates: *Mootness in Judicial Proceedings:* 62 Cal. L.R. 1385, 1401, 1412 and 1442 (Dec. 1974); *La Sala v. American Savings & Loan Ass'n.*, 5 Cal. 3rd 864; 489 Pac. 2d 1113 (1971), I reluctantly concur in the result reached in the majority opinion.

Appendix B

United States Court of Appeals
for the Ninth Circuit

Western Addition Community Organization, et al., Appellees, vs. Frank N. Alioto, et al., Appellants.	No. 74-1570
Western Addition Community Organization, et al., Cross-Appellants, vs. Frank N. Alioto, et al., Cross-Appellees.	No. 74-1529
Western Addition Community Organization, et al., Appellees, vs. Frank N. Alioto, et al., Intervenor (Firefighters), Appellant.	No. 74-1562
Western Addition Community Organization, et al., Appellees, vs. Frank N. Alioto, et al., Intervenor (Balich), Appellant.	No. 74-1563

ORDER

[May 30, 1975]

Before: BARNES, VAN OOSTERHOUT,* and ELY,
Circuit Judges.

The panel in the subject case (Barnes, Van Oosterhout, and Ely) votes unanimously to deny the Petition for Rehearing. Judge Ely votes to reject the suggestion for en banc rehearing. Judges Barnes and Van Oosterhout recommend that the suggestion for en banc rehearing be rejected.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Stanley N. Barnes
/s/Walter Ely
Martin D. Van Oosterhout
United States Circuit Judges

*Honorable Martin D. Van Oosterhout, Senior United States Circuit Judge, Eighth Circuit, sitting by designation.

Appendix C

United States District Court,
N. D. California.

No. 70 1335 WTS.

Western Addition Community Organization, et al., Plaintiffs,

vs.

Frank N. Alioto, et al., Defendants.

Nov. 19, 1973.

MEMORANDUM OF DECISION

SWEIGERT, District Judge.

This case, involving San Francisco Civil Service tests for selection of Fireman H-2, is again before the court on plaintiff's motion of June 19, 1973, requesting the court to implement its previous orders by granting immediate and further relief, specifically requesting that the court impose a racial quota formula, favoring appointment of minority applicants over non-minority Fireman H-2 applicants, until the racial composition of the Fire Department fairly reflects, percentage-wise, the racial composition of San Francisco's population.[1]

[1]Plaintiffs point out, for example, that the 1800-man San Francisco Department includes only 4 men of the Negro race appointed through regular Civil Service Commission selection procedures al-

The law, however does not require that employment, either private or public, must proportionately reflect the community racial population. On the contrary, the 1964 Civil Rights Act, Title 42 U.S.C. § 2000e-2(j), expressly provides that nothing in the Act shall be interpreted to require any employer to grant preferential treatment to any individual or group on a racial basis merely because of an imbalance between the percentage of his employees of that race in comparison with the percentage of persons of that race in the community population as a whole.

All that the law requires is that no minority job applicant (and for that matter no white job applicant), who is otherwise qualified or readily qualifiable to perform a job, shall in effect be excluded from that job by an employment test that goes beyond the actual requirements of the job and thus adversely affects applicants, generally minorities, who, although able to do the job, lack the background and education to pass an overdemanding test. When it appears, as in this case, that an employment test has operated adversely against certain racial groups, then the test becomes suspect as being overdemanding and, therefore, presumptively discriminatory and unlawful, and remains so unless and until the employer meets the burden of demonstrating that the particular test is, nevertheless, not overdemanding, but truly job-related and, therefore, a necessary test for the job's performance.

though the City's racial composition, according to the 1970 census, is 43% minority (15% black-28% other minority) and will be in 1975, according to a census projection, 51% minority (so-called). The City's high schools are already 65% minority.

This the San Francisco Civil Service Commission has three times failed to do in this case, i.e., it has failed to demonstrate, as required by law, that its challenged Fireman H-2 written examinations have been truly job-related. See Decision of January 8, 1971 re the written test of 1968; the Decision of February 17, 1972 re the written test of September, 1971, and the Decision of May 9, 1973 re a proposed 1973 written test.

It has been held by the Court of Appeals of this Ninth Circuit (see United States v. Iron Workers Union, 443 F. 2d 544 (9th Cir. 1971)) and by many other federal courts (See e. g., Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) and Louisiana v. United States, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965)), that in such a situation the foregoing provision of the 1964 Civil Rights Act must not be used by Federal District Courts to avoid responsibility for granting affirmative remedies designed to eliminate any such present discriminatory practices, to assure the non-repetition thereof in the future and to remove the vestiges of past discriminatory practices; that such affirmative remedies may be granted even though it cannot be established that the discriminatory practices were intentional or invidious.

This court has thus far refrained from invoking affirmative remedies in this case, pointing out in our decision of May 9, 1973, that any discriminatory practices in this case were not shown to have been intentional or invidious and that such remedies (which should be invoked by the courts only as a last

resort) seemed unnecessary at that time because of the court's expectation that rejection rates adverse to minority Fireman H-2 applicants would be cured within a reasonable time by simply enjoining use of the challenged written examination as a test until properly validated—meanwhile filling Fireman H-2 vacancies according to the applicants' scores on the other oral and athletic tests as the City had planned to do in any event.[2]

By its orders of February 7, 1972, February 17, 1972 and March 7, 1972, this court ordered that, pending submission of a written test properly validated as required by law, the Commission should proceed with all due diligence to give to the 1968 Fireman H-2 applicants their oral and athletic tests in order to provide a Fireman H-2 Civil Service list from which Fire Department vacancies would be filled until the City was able to bring any desired written test into compliance with the law.

Five months later, this court by its order of July 20, 1972, found that the Commission, even by that date, had already had a reasonable time within which to proceed with those oral and athletic tests and ordered it to proceed with them within 30 days from the date of that order.

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[2]As indicated in previous Memoranda of Decisions of the court, the Commission uses its written test, not to rate applicants, but only as a pass-fail test to exclude applicants who fail to correctly answer an arbitrarily fixed percentage of the questions, from proceeding to take the oral and athletic tests upon which the surviving applicants will be actually rated and ranked on the Civil Service list.

Nearly a year later, this court by its order of May 9, 1973, after rejecting the Commission's proposed 1973 examination) again directed the Commission to do two things: (1) to proceed with reasonable diligence to empirically validate its Fireman H-2 selection procedures as considered necessary even by its own Director of Recruitment as far back as November 24, 1971, and(2) meanwhile, in order that there be no further interruption in filling San Francisco fireman manpower requirements, to fill the Fire Department's current and developing vacancies in the manner authorized and directed by this court as far back as February 1972.

To date the Civil Service Commission has failed to comply with either of these two requirements—notwithstanding the fact that the San Francisco Fire Department has meanwhile accumulated in excess of 200 vacancies with additional vacancies occurring every month. In other words, a vitally necessary City facility, which must operate on double shifts around the clock day and night, is now more than 11% undermanned.

Further, notwithstanding this court's previous orders of February and March, 1972, to proceed promptly with giving to the 1968 Fireman H-2 applicants their oral and athletic tests (lest fireman manpower requirements and the rights of applicants be adversely affected), the Commission failed to complete its athletic tests until August, 1973, and its oral tests until September, 1973.

The Commission's dilatoriness in these matters and apparent stubborn insistence upon arguments and alternatives which this court has repeatedly found unacceptable, have created an intolerable situation; the adequacy of Fire Department manpower for the safety of the City is coming into question; all Fireman H-2 applicants, both minority and non-minority, have been kept in a state of uncertainty for several years and the rights of minority applicants to a more prompt correction of the City's still unvalidated selection procedures are involved.

The Commission now has a pool of Fireman H-2 applicants who have taken and passed its tests as follows: The written examinations:[3] 126 minority and 394 non-minority applicants took and passed the written examination at a 50 out of 100 questions exclusion cut-off point and, under Civil Service procedures, became eligible to proceed to the oral and athletic tests.

The oral[4] and athletic examinations: 118 minority

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[3]This written examination was given on June 9, 1973, to 524 applicants (130 minority and 394 non-minority) under a provision of this court's previous order of May 9, 1973 allowing the giving of that proposed written test for certain limited purposes and subject to certain conditions stated at pp. 14-15 of that order—one of which conditions was that such written test might be tentatively approved *if* the exclusionary cut-off was fixed at a point that would assure no adverse effect upon minority applicants. The Commission has heretofore proposed a cut-off point of 65% but the court now finds that only if that cut-off point be modified to 50%, will avoidance of adverse effects on minority applicants be assured.

[4]All through this litigation plaintiffs' challenge to the Commission's selection procedures has been directed at the written examination. Not until June 19, 1973, did plaintiff raise a question concerning the oral examination which was then being given under

and 394 non-minority applicants took and passed the oral examination and the athletic examination and will be rated and ranked on the Foreman H-2 eligible list according to their scores.

All 512 applicants (118 minority and 394 non-minority) who have taken and passed these three examinations (and also certain background and medical tests) are now civil service qualified Fireman H-2 eligibles. There can no longer be any valid claim that appointment of any or all of them, minority or otherwise, will involve introduction of untested, unqualified minority applicants into the Fire Department.[5]

Upon the facts found and for the reasons indicated above the court concludes and makes its further order as follows:

(1) Until the further order of this court, the 512 Fireman H-2 applicants who have passed the written examination, the oral examination and the athletic examination as above set forth, shall constitute the Civil Service list from which the Commission shall proceed to forthwith fill existing Fireman H-2 vacancies—one (1) qualified minority applicant and one (1) qualified non-minority applicant alternatively

the court's order and was not complete until September. For this reason the issue of the validity of the oral examination has not been heard. However, reports on the results of the oral examination completed in September do not show any such adverse effect on minorities as would justify eliminating, at this point, that test for rating purposes.

[5]In addition, the City has the right under its own ordinance to terminate any Fireman H-2 who, during the initial 8 week Fire College on-the-job training and testing period or during the one year probationary period, or at any other time allowed by law, is found to lack any job-related knowledge, skill or trait. Nothing in this order shall be deemed to impair that right.

from sublists of qualified minority and qualified non-minority applicants—until the sublist of qualified minority applicants has been exhausted.[6]

[6]Similar and even more far-reaching affirmative relief has been granted in 13 federal cases (5 involving fire department civil service and 8 involving police department civil service); three of these cases have been Court of Appeal cases (1st, 2d and 8th Circuits). See also, *Morrow* case, 5th Circuit, infra, and 10 have been District Court cases. No federal cases to the contrary have been called to our attention.

Carter v. Gallagher, 452 F.2d 315, 327 (8th Cir. 1971, cert. den. by U.S. Supreme Court, 405 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972), a Minneapolis Fire Department Civil Service case in which an 8 to 1 Circuit (en banc) decision holds to the effect that, although absolute preference is improper, the District Court should impose some reasonable quota hiring system, e. g., a one to one ratio (p. 330 seq.) until a certain member of qualified minority persons have been hired; Castro v. Beecher, 459 F.2d 725, 736 (1st Cir. 1972), a Boston Police Department Civil Service case in which the court reverses 334 F.Supp. 930 (Wyzansky, J.) for failure to provide some form of affirmative quota relief; Bridgeport v. Civil Service Commission, 482 F.2d 1333, 1340 (2d Cir. 1973), a Bridgeport, Connecticut, Police Department Civil Service case in which the court unanimously affirms a hiring quota (one for one) until 50 minority patrolmen appointed, as had been required by the District Court in 354 F.Supp. 778 (D.Conn.1973); Morrow v. Crisler, 479 F.2d 960 (5th Cir. 1973), a Highway Police Civil Service case in which a 2 to 1 majority decision is to the effect that the District Judge's failure to include affirmative quota relief was not necessarily an abuse of discretion; a dissenting judge held contra, citing among other cases United States v. Ironworkers, 443 F.2d 554 (9th Cir. 1971), cert. den., 404 U.S. 484, 92 S.Ct. 447, 30 L.Ed.2d 367. A majority of the active judges of the 5th Circuit voted in favor of a hearing en banc which was held October 17, 1973, but no final decision as of 2/6/73.

See also, District Court cases in which quota relief has been granted: Davis v. County of Los Angeles (Los Angeles Fire Department) No. 73-63 W.P.G. (C.D.Calif. 6/7/73; Coffee v. Braddy, No. 71-44 (M.D.Fla.1971); Arnold v. Ballard, No. C-73-478 (N.D. Ohio 5/14/73); Harper v. Baltimore (Fire Dept.) 359 F.Supp. 1187 (D.Md.1973); Commonwealth v. O'Neil (Philadelphia Police Department), 348 F.Supp. 1084 (E.D.Pa.1972) (modified in 473 F.2d 1029 (3rd Cir. 2/8/73 en banc); NAACP v. Allen (State Police) 340 F.Supp. 703 (N.D.Ala.1912); Shield Club v. City of Cleveland, 370 F.Supp. 251 (N.D.Ohio 1972); Pennsylvania v. Sebastian, 368 F.Supp. 854 (W.D.Pa.1972).

See also, Porcelli v. Titus, 431 F.2d 1254 (3rd Cir. 1970), cert. den. 402 U.S. 944, 91 S.Ct. 1612, 29 L.Ed.2d 112 (1971), a Newark

(2) Any excess of qualified non-minority applicants remaining at that point on the Civil Service list shall retain their places thereon and on any future Fireman H-2 Civil Service list constituted as hereinafter provided, subject only to the court's determination concerning whether the alternating method of appointing qualified eligibles from any future H-2 list should be terminated or continued.

(3) Meanwhile, the Commission shall continue to take steps with all reasonable diligence to comply with this court's previous orders to empirically validate its Fireman H-2 selection procedures as being truly job-related and nondiscriminatory within the meaning of Civil Rights Act of 1964, Title VI; also Guidelines on Employee Selection Procedures (Federal Register, Title 29, Chap. XIV, §§ 1607.1-1607.14; Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 2d 158 (1971); and, upon a showing to that effect, to

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New Jersey School faculty promotion case in which the court unanimously holds that a challenged preferential promotion program, although based on race, was designed to racially integrate the faculty and was proper. (Compare, Anderson v. S.F. School Dist., 357 F.Supp. 248 (N.D.Cal.1972); Defunis v. Odegaard, 82 Wash.2d 11, 507 P.2d 1169, 1181 (1973), a State University Law School admission case in which a white applicant claimed preferential admission had been given to minority applicants. A 6 to 2 decision, reversing trial court, holds that the challenged admission procedure was *not* arbitrary or capricious (citing Carter v. Gallagher, supra; also citing Porcelli v. Titus, supra). A dissent (507 P.2d at pp. 1197 and 1200) cites Anderson v. S.F. School District, supra. It is this case which was recently 11/20/73 accepted on certiorari by the U.S. Supreme Court (42 Law Week 3306). Compare this acceptance with the denial of certiorari in Carter v. Gallagher, supra.

See also, school teacher hiring cases, e. g., Armstead v. Starkville School District, 461 F.2d 276 (5th Cir. 1972); Baker v. Columbus, 462 F.2d 1112, 1115 (5th Cir. 1972).

conduct its future Fireman H-2 examinations based on such validated tests.

(4) In connection with any future Fireman H-2 Civil Service examinations and as a means of reassuring and encouraging minority applicants the Commission shall take steps designed to inform all potential Fireman H-2 applicants—especially but not exclusively, potential minority applicants—concerning its application and testing procedures giving a general description of the subjects considered to be job-related, and that its examinations have been validated as above required.

(5) These provisions should serve to expedite the filling of existing and rapidly increasing Fire Department vacancies with qualified eligible applicants including at least 118 qualified minority applicants. The court, however, reserves power to make such further orders as may be found necessary to fashion further affirmative relief compatible with the facts as above found or as they may be hereinafter found.

Appendix D

United States District Court
Northern District of California

No. 70 1335 WTS

Western Addition Community Organization, et al., Plaintiffs,

vs.

Frank N. Alioto, et al., Defendants.

ORDER

(Supplement to this Court's Order of November 19, 1973)

[Filed Sep. 23, 1974]

Plaintiff's pending motion is for an order to the effect that 60% of all future appointments of Firemen H-2 from the San Francisco Civil Service list must be minorities (i.e., appointment of 3 minorities for every 2 non-minority-white) until 40% of the Department personnel consists of minorities—presumably to reflect the City's racial population pattern.

This motion is premature because there are now no minority eligibles on the present Civil Service

list—all of the 118 minority eligibles on the list having already been given expedited (1 for 1 ratio) appointment by the Civil Service Commission—some waived appointment) in compliance with this Court's order of November 19, 1973; all eligibles now remaining on the list happen to be non-minority (white) who have taken the tests, qualified and have been long awaiting appointment.

The effect of such an order as plaintiffs request would be to prohibit appointment of any of those non-minority (white) eligibles remaining on the list until more, but presently unidentifiable, minority persons might apply in the future for testing and placement on the list—with a then increased preferential ratio of 3 minorities for every 2 whites.

This court does not consider such an order to be timely, necessary or fair and, further, it could adversely affect the efficiency of the Fire Department and the public safety.[1]

[1]This court's invocation of a limited appointment ratio in its Order of November 19, 1973, was designed to expedite the appointment of a limited number (118) of identified minority eligibles who had actually taken the examination and were then actually eligible on the list from which appointments were then being unreasonably delayed by defendants. That order should not be construed as an implication that the court must now issue such an unlimited, open-ended order as plaintiffs request as a means of requiring that Fire Department personnel reflect the racial pattern of the City.
In making its November 19, 1973 Order, this Court recognized that racial quotas for such a purpose run counter to the policy expressly declared in the 1964 anti-discrimination employment law (42 U.S.C. § 2000 2-j) which expressly provides that "nothing in this Act shall be interpreted to require any employer to grant preferential treatment to any individual or group on a racial basis merely because of an imbalance between the percentage of his

However, insofar as plaintiff's motion requests that the Civil Service Commission proceed with diligence (as already previously ordered by this Court) to complete further tests for placement of additional applicants on the list who, presumably, will include both minority and non-minority), the motion will be granted to the following extent:

(1) The Civil Service Commission is ordered to complete on or before January 31, 1975, validation of its written examination—which validation would make any future appointment ratio order unnecessary.

(2) If, for any reason such validation cannot be or is not completed by that date, the Civil Service Commission is ordered to by then have completed further tests (including the non-rated written examination of June 9, 1973 or its pattern equivalent—with not more than a 50% score cut-off) for placement of additional applicants (presumably including minorities) on the Fireman H-2 list—in which event, or in the event of the Commission's failure to comply with either of the above, the Court, under its previous

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employees of that race in comparison with th percentage of persons of that race in the community population."
The Court further recognized that, although many federal District Courts and Courts of Appeal have thus far refused to regard that Act of the Congress as prohibiting judicial remedial relief in the form of racial quotas (See authorities cited at p. 2 of our November, 1973 Order), such racial quotas, as stated in that order, "should be invoked by courts only as a last resort." See similar caveats in most of the cited cases and see also, e.g., the recent case of *Harper v. Baltimore*, 359 F.Supp. 1187 (1973) at pp. 1213-1215—a fire department case in which a racial quota, although recognized as within the judicial power, was refused. It was with such caveats and limitations in mind that this Court ordered expedited appointments for an identifiable, limited (118) minority group then already on the eligible list.

reservation of power, will consider, according to the then existing circumstances, (including among other things the number of non-minorities (whites)) appointed meanwhile to the Department under Paragraph 3, infra) whether, and if so, to what extent, a further limited quota requirement should be imposed as a condition to appointment of further H-2 Firemen in order to afford relief to any identifiable minority group then on the list.

(3) Pending compliance by the Commission with this Order and the further determination of this Court, the Civil Service Commission, upon filing with it (and with this Court) a certification by the Chief of the Fire Department that the efficiency of the Department and/or the public safety requires immediate appointment of additional H-2 Firemen giving the number thereof, may appoint such number of eligibles from the present Fireman H-2 Civil Service list. The Commission will file a report of any such action with this court—with a copy to the parties to this action.

Dated: September 23, 1974.

/s/ W. T. Sweigert
W. T. Sweigert
United States District Judge

NOV 12 1975

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. 75-309

FRANK N. ALIOTO, et al.,
Petitioners,

v.

WESTERN ADDITION COMMUNITY ORGANIZATION, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals For the Ninth Circuit

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IN THE
SUPEME COURT OF THE UNITED STATES

October Term, 1975

NO. 75-309

FRANK N. ALIOTO, et al.,)
)
Petitioners,)
)
v.)
)
WESTERN ADDITION COMMUN-)
ITY ORGANIZATION, et)
al.,)
Respondents.)
)

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI
to the United States Court of Appeals
For the Ninth Circuit

Respondents Western Addition Community Organization, et al., file this Brief in opposition to the Petition for Writ of Certiorari and pray that the Writ be denied.

QUESTIONS PRESENTED

1. Whether the continuing eligibility of some unspecified number of minority persons for the Civil Service position of H-2 Fireman in San Francisco and the possibility that one or more of these persons might seek such appointment present a continuing controversy on the constitutionality of the District Court's November 19, 1973 Order.

2. Whether, in light of the continuing jurisdiction of the District Court, the appellate decision below is in direct conflict with decisions of this Court on mootness.

STATEMENT OF THE CASE

In June of 1970, Respondents and plaintiffs below initiated a class action suit in the District Court against Petitioners and defendants below. Respondents, who brought the action under 42

U.S.C. §§ 1981 and 1983, claimed that the pre-employment selection procedures, and specifically the written examination, used by the San Francisco Fire Department were illegally discriminatory against minority candidates for the H-2 Fireman position; a second claim was that Petitioners were violating the due process and equal protection rights of the Respondents under the Fourteenth Amendment to the United States Constitution.

Numerous memoranda of decisions, orders and supplemental orders issued during the next forty months, i.e., prior to November, 1973. (See reported cases at 330 F.Supp. 536; 340 F.Supp. 1351; and 360 F.Supp. 733. Also see orders not officially reported in the Commerce Clearing House topical reporter of Employment Practices Decisions (hereafter "E.P.D.") at 4 E.P.D. ¶ 7663, p. 5604, and 5 E.P.D.

¶ 7970.) During this time period, the District Court (1) repeatedly rejected as inadequate or improper Petitioners' efforts to justify or redeem their pre-employment procedures and (2) exhorted them to comply with prior orders and to cease discriminatory conduct. While the District Court enjoined the Petitioners from using certain specific discriminatory and non-job-related written selection devices, it never stopped the Petitioners from hiring. In fact, the District Court continually urged the Respondents to begin filling vacancies then accruing in the Fire Department. Despite the absence of an injunction against hiring, the Petitioners chose to refrain from hiring and almost two hundred vacancies accrued in the Fire Department.

In November of 1973, the District Court ordered the Petitioners to begin

hiring, and to do so in a non-discriminatory fashion, from among 500 or so applicants then deemed minimally qualified according to existing Civil Service procedures (369 F.Supp. 77 and Petitioners' Appendix C). Specifically, the Court decreed that appointments should proceed in a ratio fashion, with one qualified minority appointed for every qualified non-minority appointed until further order of the Court or until the list of qualified minorities was exhausted. The District Court reserved further jurisdiction to review the Petitioners' future validation efforts, to consider the continuation or termination of the interim ratio-hiring procedure, and to make further orders as necessary regarding compliance and affirmative relief.

Petitioners were unsuccessful in their request for a stay of the Order

from the District Court. Petitioners and two sets of intervenors below then appealed to the Court of Appeals for the Ninth Circuit, claiming the interim ratio-hiring procedure was violative of the Constitution and Title VII of the 1964 Civil Rights Act. Respondents cross-appealed regarding the duration and adequacy of the interim relief.

The Petitioners did not seek a stay of the District Court's Order from the Ninth Circuit, and did not seek expedition of the appeal for some eleven months and until after Respondents had moved for expedition and the Ninth Circuit had granted same[1].

During the pendency of the appeal,

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1 The Court of Appeals per Judge Chambers granted Respondents' motion for an expedition of hearing on November 15, 1974. Eleven days later, on November 26, 1974, Petitioners filed papers indicating they were joining in the expedition motion.

the Petitioners acted to comply with that part of the District Court's order with respect to hiring. By September, 1974, they had appointed or had offered appointment to all of the minorities on the Civil Service eligibility list for H-2 Fireman. In total, there were 110 minority eligibles among a pool of 490. The Respondents moved the District Court to order the beginning of a new testing process and an extension of the ratio-hiring scheme. The District Court considered these matters and, on November 23, 1974, issued an order (supplemental to its previous order of November 19, 1973)(see Petitioners' Appendix D). Respondents' motion was in greater part denied as untimely. However, the Court ordered the Petitioners to present a proper validation study by January 31, 1975, or alternatively to have completed a new selection

process and have available a new, integrated pool of eligibles by that same date. The Court also permitted the Petitioners to begin making appointments to the Fire Department from the residual pool of eligibles.

In response to that September, 1974 order, Petitioners voluntarily elected to embark on a new validation study for their written examination. Having completed that study, the Petitioners moved for approval to use the exam without restriction in the next hiring process. Respondents are cpposing this motion, and have filed a cross motion seeking final adjudication and affirmative relief. To date, voluminous briefing has occurred and is still continuing in this matter. Initial oral argument is scheduled for December, 1975.

On March 27, 1975, the Court of Appeals, after a January hearing, rendered

its per curiam opinion, declaring the Petitioners' appeal to be moot, and affirming the District Court's November, 1973 decision and order (Petitioners' Appendix A). Petitioners' request for re-hearing and suggestion for re-hearing en banc were denied and rejected, respectively, on May 30, 1975 (Petitioners' Appendix B).

REASONS WHY CERTIORARI SHOULD BE DENIED

Petitioners seek a Writ of Certiorari on the grounds that (1) the matters which they raised in the Court of Appeals are not moot because there are persons prospectively affected by the order of the District Court from which the appeal was taken; and (2) because of a "conflict" with the decisions of this Court on mootness. Petitioners do not assert that there is any conflict among the Circuits. We submit that certiorari should be denied because (1) there are presently no

persons directly affected by the Court's order at this point; (2) the state of the record, and the pendency of further District Court proceedings based on a factual context different from that before this Court or the Court below, render certiorari inappropriate; and (3) the decision sought to be reviewed is not in conflict with decisions of this Court on mootness.

A. The Continuing Existence of a Civil Service Eligibility List for H-2 Fireman Does Not Present a Factual Situation in Which the Rights and Obligations of the Parties Under the District Court's November, 1973 Order Are Still Operative.

Pursuant to the District Court's November, 1973 order, the Petitioners created an eligibility list for H-2 Fireman and, commencing in January, 1974, proceeded to offer appointments to listed candidates as vacancies in the Fire Department arose. In compliance with the challenged

portion of the order, offers of employment to minority eligibles occurred at an accelerated rate so that, by August, 1974, the minority presence on the eligibility list was exhausted in that all minority candidates had been offered appointments. It was based on this progression of facts and this understanding of the concept of "exhaustion" that the Circuit Court below concluded,

> Since the District Court's Order has been fully effected, however, no decision that we could now render as to the Order's constitutionality could alter the parties' rights and obligations under the Order. (514 F.2d 542, Petitioners' Appendix A.)

The Ninth Circuit's analysis and conclusion comports with the position taken by the District Court subsequent to August, 1974. In a September 23, 1974 order responding to a motion by Respondents and plaintiffs below, Judge Sweigert stated:

> This motion is premature because there are now no minority eligibles on the present Civil Service list -- all of the 118 minority eligibles on the list having already been given expedited (1 for 1 ratio) appointment by the Civil Service Commission -- some waived appointment) [sic] in compliance with this Court's order of November 19, 1973; all eligibles now remaining on the list happen to be non-minority (white) . . . . (Petitioners' Appendix D.)

While, to the Respondents, the analysis and recitation of facts by both Courts below seems logical and persuasive and dispositive of this point, Petitioners attempt to create or resuscitate a controversy through elevating the Civil Service waiver procedure and its effects[2] to the status, literally, of a federal question.

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2 Petitioners argue that a number of minorities offered accelerated appointment waived that right and, under the waiver procecure, may still gain appointment on an accelerated basis. The record in the Court of Appeals was devoid of evidence of this possibility, and even of specific evidence of the numbers and ethnic origin of those who had waived.

The procedure, which is authorized by local Civil Service Regulations, Rule 14, permits a candidate offered appointment to a Civil Service position to waive, on a one-time basis, that initial offer of appointment; if, at a later time while the list is still in effect, the candidate decides to lift that waiver, he may do so and thereby become eligible for a subsequent vacancy, if any. This waiver procedure considerably predated, and was in no way embraced by, the District Court orders at issue here. It was the Petitioners themselves who, acting independently of the District Court, decided that the waiver procedure was available to minorities who had rejected offers of accelerated employment.

Consequently, the existence or nonexistence of one or more minority eligibles for H-2 Fireman who have waived

initial appointment and who may or may not lift that waiver and thereby may or may not gain some advantage over white eligibles not yet offered appointment is an issue (or potential issue) born of the normal operation of local Civil Service rules and not of the subject order.

B. Even If Those Minority Candidates on Waiver Could Be Said To Be Capable of Claiming a Right Under the November 19, 1973 Order, There May Well Be No Continuing Controversy At The Present Time, And There Is An Extreme Likelihood That No Controversy Will Exist Before Hearing Can Be Held, Either In This Court or In The Court of Appeals.

As noted in the opinion of the Ninth Circuit (Petitioners' Appendix A), when the issue of mootness was raised during oral argument, the Petitioners claimed that this possibility was foreclosed by the presence on the hiring list of some minority applicants who might possibly seek appointment as firemen. Other than

these statements, the record is devoid of any factual basis to support the Petitioners' argument. In their Petition for Certiorari, they try to further buttress the mootness defense by claiming that there are ten minority eligibles presently under waiver. Respondents hold serious reservations as to the accuracy of that bald claim. Moreover, even if, for purposes of argument only, it is conceded that some right eminating from the 1973 District Court order could still attach to any minority eligible under waiver, the critical question remains: do any such rights presently, or prospectively, attach?

The Petitioners, after complying with the subject order, proceeded to make further appointments to the Fire Department under the authority of the "emergency" appointment provisions of the District

Court's September 23, 1974 supplemental order (Petitioners' Appendix D). As of the present time, Respondents are informed, the Petitioners have appointed or offered appointment to all white candidates on the eligible list who ranked at number 305 (the three-hundred-and-fifth) or higher. The numerical ranking system just referred to is not one which Petitioners contest, or one which was created or ordered by the District Court. Respondents believe that substantially all, if not all, of the eligible minorities under waiver hold ranks higher than 305. If this is the case, then the right of any eligible minority to lift his waiver and seek appointment is independently based on his ranking as determined by regular Civil Service procedures and not as based on any rights accrued pursuant to the challenged order.

Also, again conceding for purposes of argument that some "accelerated" right to appointment remains from the challenged order, there is an extreme likelihood that the present list of eligibles (including any minorities and all Whites) will be exhausted in the immediate future. Due to a change in the salary structure and working hours of the Fire Department approved by the electorate on November 4, 1975, the Chief of the Fire Department estimates "at least 350" firemen will retire between now and June 30, 1976. (See Appendix A, which is a reproduction of a newspaper article in the San Francisco Chronicle of November 6, 1975, detailing this development.) This number of vacancies will cause all persons on the present eligibility list to be offered appointments and a wholly new hiring process to start. Under these facts, there

can be no conceivable claim that any white eligible has been denied an appointment because of the challenged order.

C. The Continuing Jurisdiction of the District Court Does Not Place the Decision of the Ninth Circuit in Direct Conflict With the Decisions of the Supreme Court on Mootness.

As argued supra, there presently exists no live controversy or possibility of such controversy on the record before the Ninth Circuit. However, Petitioners make a second claim: Petitioners urge that, because the District Court has retained some form of jurisdiction in this matter and because there is a possibility that a new ratio-hiring order might issue, the order appealed from represents a continuing controversy. This position is without merit.

The possibility that the District

Court will act in the same way and for the same reasons is highly speculative. The Petitioners appealed from the imposition of a temporary ratio-hiring order carefully circumscribed in duration and particularly tailored to the factual context then before the Court. It was the form and nature of the particular type of affirmative relief granted, and not the substantive decision or the principle of affirmative relief, which the Petitioners challenged. It is sheer conjecture now to state, as Petitioners do, that because the District Court has continued supervisory jurisdiction over the administration of the remaining portions of relief, and because the Petitioners may fail to satisfy the legal standards which the Court has articulated for them[3], the District Court

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3 As noted in the Statement of the Case, the District Court in September of 1974 gave the Petitioners, defen- [continued]

will (upon Petitioners' potential failure) choose to order ratio-hiring relief from among the varied arsenal of affirmative measures in the equitable discretion of a trial judge hearing employment discrimination issues, and will do so on the same grounds previously articulated. Moreover, while Respondents feel some form of further affirmative relief is appropriate in the District Court, the Petitioners' argument ignores the fact that the District Court in this case has repeatedly expressed its reservations about the advisability, if not the legality, of even temporary ratio-hiring orders. In his most recent order, Judge Sweigert even took the position that if Petitioners' new validation efforts were successful, this

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3, (cont.) dants below, the option of commencing a new selection process for fireman or attempting a new validation effort for their pre-employment process to show its job-relatedness. The Petitioners themselves chose this latter option.

"would make any future ratio order unnecessary" (Petitioners' Appendix D).

This Court has repeatedly stated that it and the lower courts have the power to act only in the context of a justiciable case or controversy, and thus lack jurisdiction to review moot cases. See, for example, S.E.C. v. Medical Committee for Human Rights, 404 U.S. 403, 407, 92 S.Ct. 577, 579, 30 L.Ed.2d 560 (1972); Benton v. Maryland, 395 U.S. 784, 788, 89 S.Ct. 2056, 2059, 23 L.Ed.2d 707 (1969); and Liner v. Jafco, Inc., 375 U.S. 301, 306, n. 3, 84 S.Ct. 391, 394, 11 L.Ed.2d 347 (1964). As recently as June of this year, this Court, quoting with approval from North Carolina v. Rice, 404 U.S. 244, 246 (1971), stated that federal courts do not have power "to decide questions that cannot affect the rights of litigants in the case before them." Preiser v. Newkirk,

__ U.S. __, 95 S.Ct. 2330, 2334, __ L.Ed. 2d __ (1975). Decision by the Ninth Circuit on the matters in the record before it would not have had and, even more clearly in a prospective context, will not have, an effect on the rights of litigants. The order appealed from has already been complied with and, even under the most tenuous of analyses, will have ceased having any effect in the immediate future.

There is, of course, an exception to the general rule on mootness to cover cases which, by their very nature, would always be terminated before the underlying rights could be heard on appeal. i.e., matters "capable of repetition yet evading review", Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 31 S.Ct. 279, 55 L. Ed. 305 (1911). As Professor Moore has written,

[i]n such cases a strict ad-

> herence to the requirements of a present controversy would leave plaintiff always suspended between prematurity and mootness. (6A J. Moore, Federal Practice, 57.13 (2d ed., 1974).)

This Court has applied this exception in Roe v. Wade, 401 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), which challenged the constitutionality of an anti-abortion statute, and to a number of cases which attached election rules and procedures, including Moore v. Ogilvie, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969); Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, el L.Ed.2d 274 (1972); Rosario v. Rockefeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973). See also Sosna v. Iowa, __ U.S. __, 95 S.Ct. 553, __ L.Ed.2d __ (1972). This exception does not apply to the present case, The issues raised in this appeal are not of the type which, by their very nature, would never be definitively settled on appeal. Quite the contrary, in the event that the District Court should again order ratio hiring, Petitioners could immediately appeal, if necessary, seeking the appropriate stay, and have the decision reviewed[4].

> D. The Exercise of the Court's Certiorari Jurisdiction and Even an Order Causing Entertainment of the Merits in the Ninth Circuit Would be Inappropriate in the Present Posture of This Case.

As set forth in the Statement of the Case, there have been further proceedings in the District Court since the order from which the Petitioners have appealed. While the appeal was pending, the Petitioners, as discussed supra, complied with the challenged provision of the order and the Respondents unsuccessfully moved for an extension of the order and for further

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4 This would have been the case here had the Petitioners sought from the Court of Appeals a stay of the District Court's order, or sought upon filing an expedition of the appeal. Of course, as noted supra, Petitioners did, eleven months after filing, join in Respondents' motion for expedition after it had been granted.

equitable relief. Subsequent thereto, the Petitioners made a wholly new effort to establish the job-relatedness of their pre-employment test and sought court approval therefore. Respondents have filed papers objecting to that validation effort and, in part, based on the claimed inadequacies of this validation effort, have moved for prohibitory and affirmative equitable relief. With the single exception of the District Court's order of September 23, 1974, none of these developments or the substantial new evidence involved are in the record before the Ninth Circuit. Finally, the District Court has not yet heard oral argument or rendered decision on these issues, and is not likely to do so until 1976. If the District Court approves the Petitioners' latest validation effort, concommitantly rejecting Respondents' motions, further

review of Petitioners' appeal will become pointless, because Petitioners cannot claim that they have been ordered to do anything. Review in the Ninth Circuit would, in these circumstances, involve abstract questions and an advisory opinion. On the other hand, if the District Court should disapprove of the validation effort and/or grant Respondents' motions for affirmative and prohibitory relief, there would be time enough for Petitioners to seek a stay of the proceedings pending appeal of the final order; review could then proceed on a complete and current evidentiary record. This Court's certiorari jurisdiction should not be exercised on a stale record, and likewise should not be exercised to cause hearing on a stale record where the only live issues are distinct from those on appeal and are still pending before the District Court.

CONCLUSION

For the reasons stated, the Writ of Certiorari should be denied.

Respectfully submitted,

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By _____
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DATED: November 12, 1975.

[APPENDIX FOLLOWS.]

APPENDIX

San Francisco Chronicle Thurs., Nov. 6, 1975 pp. 1 & 26

Chief Says Vote Forces 350 Firemen to Retire

Duffy Jennings

At least 350 veteran San Francisco fire fighters will retire by June 30 because voters approved ballot measures altering their wages and working hours, Fire Chief Keith P. Calden said yesterday.

Calden said a number of fire department officers — himself included—are considering retirement because they fear their salaries will be reduced up to ten per cent July 1 with the passage of Proposition P.

He also said that the success of Proposition Q on Tuesday's municipal ballot will bring hefty additional costs to taxpayers in overtime and administrative work to overhaul the present scheduling system.

"We worked 30 years to get this far." he said."And now it's all gone in a few hours."

But Supervisor John Barbagelata, who authored both measures in the wake of the strike by police and firemen in August, disputed Calden's predictions and said the measures will save money.

Furthermore, Barbagelata said that if he wins the job of mayor over state Senator George Moscone in their runoff election on December 11, he will fire Calden. "There will be a new chief," he said.

Proposition P, the measure setting policemen's and firemen's salaries by the average paid in California cities with populations in excess of 350,000, was approved 129,122 to 64,093.

Proposition Q, which changes firemen's wor the schedule from shifts of 24 hours to split shifts of ten and 14 hours, passed 120,153 to 71,730.

Retirement pay is based on the salary a fireman is earning at the time he retires.

Many firemen now eligible to retire—having served 25 years or more and being 50 or older—believe the enactment of Proposition P will lower their base pay next year may retire before that can happen.

It was not known whether any of the firemen filed applications yesterday, but among those considering retirement besides Calden are Deputy Chief Joseph Daly, Assistant Chief Bruno Bassi, and Bureau of Administration Chief Andrew Casper.

Fire Fighters Union President James Ferguson, who waged a tireless campaign against Q, said there are now more than 480 hosemen and officers with 25 to 30 years of service in the Fire Department.

"Close to 400 of them will go out," he predicted"The public really didn't know what they were buying. The city will never recover from this."

Ferguson said that if 350 to 400 men retire within the next seven months, the department will be forced to close a third of its 44 stations.

Unless the examination and training cycles are shortened, he added, it would three or four years before the department could regain that many men.

Meanwhile, the resulting decline in service could have a profound effect on fire insurance rates here, now among the lowest in the nation

Daniel Mattroce, secretary for the Retirement System Board, said fire department sources have told him to expect 200 to 400 retirements during the next several months.

Immediate cash payments for this many retirees would total $3.5 million, Mattroce said. He added that most of that amount has already been accrued in the system.

But Supervisor Barbagelata scoffed at Ferguson's projections and said Q will save money.

"Why would they retire?" he asked. "There's no logic to it. They go out at their highest salary anyway."

Under the 24-hour work schedul, Barbagelata said a fireman required to fill in for a sick lieutenant, say, must be paid the lieutenant's salary for 24 hours. Under the new system, the pay would be 14 hours at the most. This alone will save $350,000 a year, Barbagelata said.

The so-called 10-14 schedule, which was in effect here until 1955, poses some new problems for fire fighters, most notably that they will be required to work 18 shifts per month, double the number of shifts they now work.

This results in a doubling of commute costs, a substantial figure for many firemen who live outside the city, some as far away as 50 miles or more.

Under the 10-14 system, a typical work week for a fireman, beginning on Monday for example, would be:

Monday and Tuesday—8 a.m. to 6 p.m.

Wednesday—6 p.m. to 8 a.m. Thursday

Thursday—6 p.m. to 8 a.m. Friday

Saturday and Sunday—Off.

Calden said he has always opposed the 24-hour shift and said that"in the long run, the efficiency of the fire department will pick up" under the new system.

Meanwhile, he foresees tremendous problems in having to regulate his work force twice a day rather than once, and said it will be at least two months before the new work hours can be implemented.

For the fire fighters' part, Ferguson said, the 10-14 schedule will inconvenience firemen's families.

A man due at work by 6 p.m., he said, will have dinner at 3:30 or 4 that afternoon, while someone on the day shift won't be dining at home until 7:30 or 8 that night.

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The system could also signal an end to a firehouse tradition here: the big evening meal.

"The day crew will have some kind of lunch," Calden said, "and the night crew will probably have sandwiches and coffee."

IN THE
SUPREME COURT OF THE UNITED STATES

CERTIFICATE OF SERVICE

I, SIDNEY M. WOLINSKY, attorney for Respondents herein, hereby certify that, on the twelfth day of November, 1975, I caused copies of this Brief in Opposition to Petitioner for Certiorari to be served on all the parties required to be served by mailing three (3) copies in a duly addressed envelope to Thomas M. O'Connor, City Attorney, and Michael C. Killelea, Deputy City Attorney, and attorneys for the Petitioners herein, 206 City Hall, San Francisco, California 94102.

DATED: November 12, 1975

Sidney Wolinsky

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